

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

United Communications Systems, Inc.)	
d/b/a Call One)	
)	
Petition for Arbitration of an)	Docket No. 03-0772
Interconnection Agreement with)	
Illinois Bell Telephone Company)	
d/b/a SBC Illinois Pursuant to Section)	
252(b) of the Telecommunications)	
Act of 1996)	

SBC ILLINOIS' MOTION TO STRIKE AND MOTION TO DISQUALIFY

Illinois Bell Telephone Company d/b/a SBC Illinois ("SBC Illinois"), by its attorneys, respectfully moves pursuant to 83 Ill. Admin. Code § 200.190 to strike as irrelevant, improper, and inadmissible certain portions of the pre-filed testimony filed in this proceeding on January 27, 2004 by United Communications Systems, Inc. d/b/a Call One ("UCS"). In particular, the Joint Statement of Craig Foster, Chris Surdenik, and Ronald Lambert ("Joint Statement") submitted on behalf of UCS should be stricken in its entirety because one of the witnesses sponsoring that testimony should not be allowed to participate or sponsor testimony in this proceeding. SBC Illinois also requests that the Commission enter an order disqualifying that witness from participating in this proceeding. Further, several portions of the Joint Statement are irrelevant, improper, and inadmissible for other reasons, regardless of the identity of the sponsoring witness(es), and should also be stricken, as identified below.

I. THE COMMISSION SHOULD STRIKE UCS'S JOINT TESTIMONY IN ITS ENTIRETY AND DISQUALIFY RONALD LAMBERT FROM PARTICIPATING IN THIS PROCEEDING

The Commission should strike UCS's Joint Testimony in its entirety because one of the witnesses sponsoring that testimony – Ronald Lambert – should be disqualified from providing

testimony in this proceeding. Indeed, SBC Illinois has applied to the Circuit Court of Cook County for a temporary restraining order, as well as a permanent injunction, enjoining Mr. Lambert from participating in any manner in this arbitration on behalf of UCS. As explained below, Mr. Lambert's participation in this proceeding is in violation of Illinois' Rules of Professional Conduct. The Commission should thus strike Mr. Lambert's testimony¹ and disqualify Mr. Lambert from further participation in this proceeding, in order to prevent further and continuing violation of those Rules.

Mr. Lambert, an attorney, formerly represented SBC and helped formulate SBC's policies regarding the resale of individual case basis contracts ("ICBs"). Mr. Lambert, without SBC's consent, is now representing UCS in opposing SBC's ICB policies. His participation in this proceeding is in direct violation of Illinois Rule of Professional Conduct 1.9. Rule 1.9 provides:

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter:
 - (1) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client, unless the former client consents after disclosure; or
 - (2) use information relating to the representation to the disadvantage of the former client, unless:
 - (A) such use is permitted by Rule 1.6; or
 - (B) the information has become generally known.

From 1996 to late 1999, Mr. Lambert was employed by SBC as in-house counsel, where his primary responsibilities included rendering confidential legal advice regarding the

¹ Because Mr. Lambert submitted testimony jointly with two other witnesses (Craig Foster and Chris Surdenik), SBC Illinois cannot determine which portions of that Joint Testimony are sponsored by Mr. Lambert and which

interpretation and implementation of the resale provisions of the 1996 Act and the FCC's *First Report and Order*, negotiating with CLECs regarding resale and interconnection agreements, and advising SBC personnel regarding resale and interconnection issues involving CLECs. Among other things, Mr. Lambert was involved in formulating SBC's policies regarding the resale of ICBs by CLECs and the disclosure of the terms and conditions of ICBs to CLECs.

Some time after resigning from SBC in late 1999, Mr. Lambert began employment with UCS. Since May 2003, UCS and SBC have engaged in negotiations regarding the resale of SBC's services to UCS, during the course of which Mr. Lambert served as one of UCS's lead negotiators against SBC. One subject of the negotiations was the issue of UCS's access to SBC's ICBs, with respect to which Mr. Lambert demanded, among other things, that SBC Illinois grant UCS "immediate access to such ICBs." UCS Arbitration Petition, Exhibit E. This position is directly adverse to the position Mr. Lambert helped formulate for SBC Illinois when he represented SBC, and is directly adverse to SBC Illinois' current position.

Despite numerous formal requests from SBC Illinois that Mr. Lambert refrain from participating in negotiations on behalf of UCS, Mr. Lambert continued that participation. Now, Mr. Lambert has sponsored testimony in this arbitration on behalf of UCS that in substantial part addresses ICBs. Mr. Lambert's participation in this arbitration, like his participation in the negotiations, violates Rule 1.9. Arbitration Issues 1 through 4 relate directly to the resale of SBC Illinois' ICBs by UCS, and UCS's access to the terms and conditions of SBC's ICBs, and thus the issues UCS raises in its arbitration petition are more than substantially related to Mr. Lambert's prior representation of SBC Illinois. Moreover, based on his prior representation of

portions are sponsored by the other two witnesses. Thus, SBC Illinois requests that the Commission strike the Joint Testimony in its entirety, subject to resubmission by UCS with those portions sponsored by Mr. Lambert excised.

SBC Illinois, Mr. Lambert was privy to confidential information concerning SBC Illinois' resale policies and positions, the disclosure of which would give UCS an unfair advantage in the arbitration.

The Commission has a clear interest in expecting the attorneys that appear before it to adhere to Illinois' Rules of Professional Conduct. Indeed, Section 200.90 of the Commission's rules state:

All persons appearing in proceedings before the Commission shall conform to the standards of conduct of attorneys before the courts of Illinois. These standards are set forth in the Illinois Rules of Professional Conduct. If any person does not conform to such standards, the Hearing Examiner may decline to permit such person to appear in any proceeding. 83 Ill. Admin. Code § 200.90(e) (citation omitted).

Mr. Lambert's participation in this arbitration, and his attempt to sponsor testimony, violate those Rules. Thus, the Commission should strike Mr. Lambert's testimony in its entirety. In addition, the Commission should enter an order barring Mr. Lambert from further participation in this proceeding, in accordance with the public policy expressed in Section 200.90.

II. THE COMMISSION SHOULD STRIKE ALL TESTIMONY RELATING TO NEGOTIATION SETTLEMENT DISCUSSIONS

Several portions of UCS's Joint Testimony, as well as exhibits to that testimony, discuss the interconnection agreement negotiations between UCS and SBC Illinois, including various positions and arguments the parties allegedly made in those negotiation settlement discussions. (The relevant portions of UCS's Joint Testimony and exhibits are identified in Attachment A hereto.) This testimony is irrelevant, improper, and inadmissible. As explained below, both case law and public policy require that this testimony be stricken.

It is well settled in Illinois that “matters concerning settlement and negotiations are not admissible.” *Garcez v. Michel*, 282 Ill. App. 3d 346, 348-49, 668 N.E.2d 194, 196 (Ill. App. 1996). *See also Barkei v. Delnor Hospital*, 176 Ill. App. 3d 681, 531 N.E.2d 413 (Ill. App. 1988); *Schnuck Markets, Inc. v. Soffer*, 213 Ill. App. 3d 957, 572 N.E.2d 1169 (Ill. App. 1991). And for good reason: “admitting evidence of settlements and negotiations would contravene public policy by discouraging litigants from settling before trial.” *Garcez*, 282 Ill. App. 3d at 349. This public policy is equally applicable in the context of interconnection agreement negotiations.

As XO stated in moving to strike portions of SBC Illinois’ testimony in the XO/SBC Illinois arbitration (Docket No. 01-0446) that discussed the interconnection agreement negotiations between XO and SBC Illinois, “[l]ong-standing Commission policy, consistent with sound public policy, requires that settlement negotiations remain confidential. To treat settlement negotiations otherwise would stifle discussions and impede the possibility of settlement.” XO’s Motion to Strike, Docket No. 01-0466, at 4 (filed Aug. 2, 2001). Further, XO explained,

it is inappropriate for a witness in [an interconnection agreement arbitration] to discuss the statements made or positions taken during negotiations. By failing to strike [such testimony], the Commission would effectively discourage continued negotiations during this proceeding, as well as in future proceedings, and would severely limit the parties from engaging in the give and take and compromise necessary for any serious negotiation. *Id.* at 5.

Responding to XO’s Motion, the Commission Staff agreed, stating:

Staff shares the concern expressed by XO that positions taken during negotiations over the terms of an Interconnection Agreement not be brought into the record of arbitration proceedings. Parties must be free to offer and probe positions in negotiations that they may not ultimately support on the record. Bringing references to any such negotiation positions into the record may well have a “chilling effect” on parties’ willingness to explore settlements in off-the-record settings. Staff

Response to Motion to Strike, Docket No. 01-0466, at 2 (filed Aug. 16, 2001).

Indeed, Staff went even further, arguing that “the constraint against revealing settlement negotiations [] should extend to all filings and submissions, and not just to testimony.” *Id.*²

Finally, the portions of the Joint Testimony that discuss the parties’ settlement negotiations are utterly irrelevant. The purpose of this arbitration is not to decide which party should prevail on an issue based on the parties’ prior settlement efforts or positions advanced in negotiations. Rather, the Commission’s task is to reach a decision based on the arguments put forth *in this arbitration* by the parties.

For all these reasons, the Commission should strike those portions of UCS’s Joint Testimony that address the parties’ settlement negotiations, as indicated in Attachment A hereto.

III. THE COMMISSION SHOULD STRIKE UCS’S ILL-DISGUISED ATTEMPT TO ADD NEW ISSUES TO THE ARBITRATION

Arbitration Issue 1, as identified in UCS’s December 18, 2003 Petition for Arbitration (pp. 7-11), is “Whether the definition of ‘Resale Services’ in the Agreement should include individual case basis contracts (‘ICBs’)?” Petition at 7. As UCS then describes, the parties have been unable to reach agreement regarding whether UCS can resell SBC Illinois’ ICBs to new end users. *Id.* at 7-11. However, in its Joint Testimony, after discussing Issue 1 (at pp. 6-15), UCS then launches into an entirely different issue regarding access to “18/6 billing” (at p.15 line 13 through p.25 line 16).³

² In its own response to XO’s Motion to Strike, SBC Illinois agreed to strike the portions identified by XO, provided that XO’s own testimony referring to negotiations was also stricken. *See* SBC Illinois Response to Motion to Strike and Motion to Strike, Docket No. 01-0466, at 10 (filed Aug. 15, 2001).

³ UCS discusses this same new issue later in its testimony. *See* Joint Testimony p.97 line 16 through p.98 line 5; and p.98 lines 8-9. This testimony too should be stricken, for all the same reasons discussed below.

This testimony clearly goes far beyond the scope of Arbitration Issue 1, as UCS itself defined that issue in its Petition. Indeed, UCS goes so far as to propose entirely new interconnection agreement language that appeared nowhere in the proposed language UCS submitted as Attachment C to its Petition. *See* Joint Testimony at 25. Pursuant to the 1996 Act, UCS was required to identify the issues to be arbitrated in its Petition. It is too late for UCS to sneak in new issues via its testimony, and this language should be stricken.

As the caption of this case clearly indicates, this is an arbitration proceeding being conducted under Section 252(b) of the 1996 Act. Section 252(b) provides that a party petitioning for state commission arbitration shall submit a “petition” and, “at the same time,” shall “provide the State commission all relevant documentation concerning the unresolved issues.” 47 U.S.C. § 252(b)(2)(A)(i). Thereafter, Section 252(b) allows the “non-petitioning party to a negotiation” to “respond to the other party’s petition” and submit additional issues for arbitration. *Id.* § 252(b)(3). It does *not* allow the petitioning party to “respond” to its own petition by adding new issues in its testimony.

This plain reading of Section 252 is confirmed by Section 252(b)(4)(A), which provides that “[t]he State commission *shall* limit its consideration of any petition under paragraph (1) (and any response thereto) to the *issues set forth in the petition* and in the response, if any, filed under paragraph (3).” 47 U.S.C. § 252(b)(4)(A) (emphases added). *See also id.* § 252(b)(4)(C) (“[t]he State commission shall resolve each issue set forth in the petition and the responses, if any”). In other words, UCS, as the petitioner, was required to set forth the issues it would like the Commission to arbitrate in its Petition, and the Commission must limit its arbitration decision to the issues raised in UCS’s Petition (as well as any issues raised in SBC’s response to the Petition). *See also* 83 Ill. Admin. Code § 761.110(b) (incorporating the requirements of Section

252(b)(2) into the Commission's arbitration rules). UCS cannot introduce new arbitration issues in its testimony.

For these reasons, the identified portions of UCS's Joint Testimony (p.15 line 13 through p.25 line 16; p.97 line 16 through p.98 line 5; and p.98 lines 8-9) should be stricken.

IV. UCS'S SCURRILOUS AND UNSUPPORTED ACCUSATIONS REGARDING SBC ILLINOIS' COMPLIANCE WITH THE ILLINOIS PUBLIC UTILITIES ACT SHOULD BE STRICKEN

In several places,⁴ UCS's Joint Testimony contains a bare allegation that certain SBC policies violate sections 13-514 and 9-250 of the Illinois Public Utilities Act ("PUA"). These scurrilous accusations should be stricken. If UCS believes that SBC Illinois has violated the PUA, the PUA contains provisions whereby UCS may institute a complaint proceeding before the Commission. *See, e.g.*, 220 ILCS 5/13-515 (providing procedures for telecommunications carriers to file a complaint alleging a violation of section 13-514). This Section 252(b) proceeding, however, is not the appropriate forum for such allegations.

Under the 1996 Act, the Commission's charge in this proceeding is to decide issues concerning the terms and conditions of an interconnection agreement between the parties, and to ensure that its resolution of the issues and any conditions it imposes upon the parties meet the requirements of Section 251 of the 1996 Act. UCS's disparaging accusations (which in the end amount to nothing more than bare assertions of legal conclusions) have no bearing on those matters. SBC Illinois should not have to choose between ignoring these accusations – which, though irrelevant and unfounded, paint SBC Illinois in an unflattering light – and spending time and effort responding to UCS's allegations. Accordingly, the accusations should be stricken.

⁴ The applicable pages are: page 11, line 19; page 25 line 26 through page 26 line 4; page 74 lines 13-14; page 77 lines 3-4; page 83 line 5; page 89 lines 4-6; page 95 lines 18-21; page 105, line 13; and page 160, line 16.

V. CONCLUSION

For the reasons set forth above, the Commission should grant SBC Illinois' Motion to Strike and to Disqualify.

Dated: January 29, 2004

Respectfully submitted,

SBC ILLINOIS

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